

INITIAL STATEMENT OF REASONS: *USE OF FORCE REGULATIONS*

OPERATIONAL NECESSITY/EMERGENCY

This action adopts, amends and repeals provisions governing the California Department of Corrections (CDC) staff's use of force. This important package is being filed as an "emergency" so that it can be effective as soon as possible after the training of staff is completed. The alternative, filing it using the regular process, could delay the policy's effectiveness for up to one year. Although staff training sometimes occurs after a policy is changed, training on the use of force policy must be done beforehand. The training necessary on this particular policy is too complex and important to defer. Therefore, the regulations should not be made effective immediately. They should be made effective at the earliest practical time after the completion of training. An April 1, 1999 effective date was chosen as the date the Department anticipates the training will be completed.

This policy is necessary to uphold the sanctity of human life and provide clear direction to correctional staff regarding the permissible use of deadly and non-deadly force. Thus, it also aids in the overall security of the prisons and in the protection of public safety. The Select Shooting Review Panel's *Findings and Recommendations*, issued in October 1998, concluded that 77% of the 31 shootings reviewed were not justified. Please see attachment. It is imperative that clearer policy direction be given to field staff immediately. The proposed regulation changes are intended to provide clarity in this area.

These regulations provide practical guidance for correctional officers who must make grave decisions regarding the use of deadly force under the most trying of circumstances. This policy is also intended to achieve uniformity among the various departmental components and facilities, which previously had interpreted the existing policy in different manners.

GENERAL NECESSITY

This action amends provisions governing the departmental staff's use of force. Legitimate penological interests support clarification of the Department's use of force policies. These policies are calculated to reduce injuries and death to inmates, staff and members of the public, while providing adequate security to prisons and preventing inmate escapes into surrounding communities. Promulgation of these standards in formal regulations also provides increased notice to inmates and the public of the levels of force likely to be used at departmental facilities.

These regulations will supercede all local policies, administrative bulletins, instructional memoranda and the Department Operations Manual [including the restricted portions] to the extent those are inconsistent with the new standards.

Courts have used a variety of legal standards in evaluating use of force by peace officers, public officers and private persons. As a policy matter, the Department has chosen to set its use of force and deadly force policies at a conservative level, that of the "objective" reasonable "trained competent correctional employee." This is calculated to satisfy or exceed all applicable legal standards.

Various statutes applying to the use of force are being interpreted by the Department's new policy. California Penal Code (PC) §§ 195, 196 and 197 address excusable and justifiable homicide. These standards are generally relevant to the question of whether a particular use of deadly force would be prosecutable in California's criminal courts. Similarly, *Tennessee v. Garner* (1985) 471 U.S. 1, 105 S.Ct. 1694 sets a Fourth Amendment "objectively reasonable" standard evaluating the general legitimacy of shootings by peace officers. Additionally, PC § 2650 protects inmates from unreasonable punishment by staff. See *People v. Ceballos* (1974) 12 Cal.3d 470.

Relevant cases include federal courts interpreting 42 U.S.C. § 1983 Civil Rights Act. The Eighth Amendment also applies to the use of force in prison. *Whitley v. Albers* (1985) 475 U.S. 312, 327, 106 S.Ct. 1078. The Eighth Amendment protects inmates from "cruel and unusual punishments." The proposed use of force policy is intended to satisfy the mandates of the Fourth and Eighth Amendments,

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as well as California and federal law. This conservative policy is also intended to increase public trust in the Department, as future uses of force are inevitably applied.

New Article 1.5, *Use of Force*, was added to highlight the importance of basic use of force policies. Adding the new article also makes the policy easier for staff and affected persons to find in the growing Director's Rules, Division 3 of Title 15 of the California Code of Regulations.

Changes were also made to existing Article 2, *Security*, to ensure consistence, avoid unnecessary duplication, and add additional reference citations. Obsolete policies were also deleted. These changes affect §§ 3276, 3277, 3279, 3280 and 3281.

Non-substantive changes for improved clarity, including changes in grammar and punctuation, are made to meet CDC's current style standards. Re-numbering of existing sections was necessary due to the deletion of some sections and the moving of others.

The Department of Corrections must determine that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected private persons than the action proposed.

SPECIFIC NECESSITY FOR PARTICULAR PROVISIONS

New § 3268, *Use of Force*, is adopted to provide a clear and up-to-date policy statement for staff to use in determining whether to use force and what level of force is necessary and permitted by the Department.

Subdivision (a) provides definitions generally applicable to staff use of force.

Subdivision (a)(1) *Reasonable Force*, sets an objective standard which is consistent with the Fourth Amendment and Civil Code (CC) § 50, specifically implementing PC §§ 835 and 835a. CC § 50 permits any person to use reasonable force to protect self or others. PC §§ 835 and 835a permit peace officers to use reasonable force to effect arrest, prevent escape or overcome resistance in making an arrest or detention.

Subdivision (a)(2) *Unnecessary Force*, defines the term "unnecessary force," clarifying that use of force is not necessary or appropriate in some situations.

Subdivision (a)(3) *Excessive Force*, defines the term "excessive force," clarifies that "excessive" is an amount of forces greater than permitted under the definition of reasonable force, above. This subsection also implements PC §§ 149 and 2652. PC § 149 prohibits any public officer from assaulting or beating any person without lawful necessity. PC § 2652 prohibits prison use of "cruel, corporal or unusual punishment" against inmates. See also the discussion in the prior section of the Fourth and Eighth Amendment limitations on the use of "reasonable force," or "cruel and unusual punishments," respectively.

Subdivisions (a)(4) *Non-Deadly Force* and (a)(5) *Deadly Force* distinguish less lethal methods of force, not likely to cause death, from methods likely to cause death, e.g. firearms, choke holds. The criteria of likelihood to cause death is an objective standard consistent with use of an objective standard in defining "reasonable force," above.

Subdivision (a)(6) *Use of Force Options*. Peace Officers, including correctional officers designated by the Director, are authorized under PC § 830.5 to use firearms, which are deadly force, in effecting their duties. PC §§ 835 and 835a authorize peace officers to use reasonable force to effect arrest, prevent escape or overcome resistance in making an arrest or detention. Authority to use firearms implies

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statutory authority to use lesser means of force. The Department trains its peace officers in the use of a variety of techniques to effect and maintain control over inmates. PC §2651 limits staff punishments of inmates to those methods authorized by the Director. These statutes are implemented by this section that enumerates the permitted use of force techniques. These are the tools provided to departmental peace officers to be used in their informed discretion under the standard of “reasonable force,” set forth in subsection (a)(1) above. Subdivision(a)(6)(B)1. and (a)(6)(B)2. define the terms *Less-Lethal Weapons* and *Firearms*, respectively. These definitions distinguish *less-lethal weapons* as the methods of force not likely to cause death from *firearms*, a method of force likely to cause death.

Subdivision (b) uses the preceding definitions to clarify departmental policy, that employees use the amount of force reasonably necessary to perform their duties. It further clarifies that there is a continuum of force between minimal, necessary, reasonable, unnecessary and excessive force. It instructs staff to be reasonable and prohibits unreasonable or excessive force.

Subdivision (c) clearly specifies the limited situations that the Department permits staff to use deadly force. All uses of deadly force by employees must also be “reasonable force,” as that term is defined in section 3268(a)(1), above. Thus, deadly force would not be reasonable force in cases where the facts and circumstances known to the employee rendered deadly force as “excessive force,” as that term is defined in section 3268(a)(3), above. California correctional system employs the lowest ratio of uniformed peace officers to inmates in the nation. Our prisons are among the most overcrowded in the world. The Department weighed institutional concerns against the rights of the inmates in order to determine reasonable use of deadly force standards. The deterrent and ability to use deadly force in limited situations is necessary to maintain order and the safety of staff, inmates, visitors and contractors within the prisons.

Subdivision (c)(1) permits staff to use deadly force to defend self or others against immediate threat of death or great bodily injury. This clarifies staff implementation of PC § 197, stating those situations constituting justifiable homicide.

Subdivision (c)(1)(A) defines the term “great bodily injury” as an injury that creates a substantial risk of death. Therefore, as applied to the use of deadly force, an employee may use this force to defend against the type of injury that at that time appears to present a substantial risk of death. This standard meets all applicable constitutional requirements.

Subdivision (c)(2) permits staff to use deadly force to prevent an escape from “custody.” This clarifies staff implementation of PC § 835a--the duty to pursue to prevent escape and to maintain lawful custody. The term “custody” is a correctional term of art that means a variety of specific things depending upon the type of facility, program, time of day and other factors. The places where an inmate areis permitted to be present depend upon their work assignments, shifts, lock downs and the time of day. For example, a work crew inmate may be outside the dormitory building beyond the security perimeter during the day or during a work shift, but not at 2:00 A.M. Also, an inmate on a work crew cleaning a city park within an assigned area would not be shot for escaping until they were leaving the assigned area. It would be unweildy to attempt to spell out all the potential circumstances when an inmate would be escaping from custody. To do so would run counter to the important objective of simplifying the policy and making it readily learned and understood by inmates and staff.

Subdivision (c)(3) permits staff to use deadly force to stop acts that constitute an immediate jeopardy to institutional security and because of their magnitude, are likely to result in escapes from custody or the death of other persons. This clarifies that various violent or dangerous inmate acts, such as riots or arson, would not justify the use of deadly force by merely satisfying the minimum definitions provided in the Penal Code, eg. PC § 404 and § 451. Deadly force would not be permitted unless the riots, arson

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or other acts were of sufficient magnitude to present a likelihood of escapes or death of other persons. This implements both PC § 197 and § 835a.

Subdivision (c)(4) permits staff to use deadly force to dispose of seriously injured or dangerous animals when to do so would be reasonable force as defined in subdivision (a). Deadly force to dispose of dangerous animals would implement rights to self defense or defense of others under CC § 50, and the duty of the director to provide for the care and custody of inmates under PC § 5054. Permitting staff to use deadly force to dispose of seriously injured stray animals, when no other disposition is practical, implements PC § 597.1(e).

Subdivision (d) prohibits staff from discharging a firearm if there is reason to believe that persons other than the intended target will be injured. Bullet ricochets off concrete would be an example of one possible cause of injury to a person other than the intended target. This implements PC § 246.3's prohibition against grossly negligent discharge of a firearm. This also implements a peace officer's general duty to protect the public from force not otherwise legally justified or excused. Since CC § 50 permits a person to use only reasonable force to protect self or others, discharging a firearm where others will likely be injured might not satisfy the "reasonableness" test.

Subdivision (e) permits warning shots in an institutional or facility setting in situations where policy otherwise permits use of deadly force. However, this provision prohibits warning shots in other situations. The characteristics of the setting where force is to be used is an important factor in determining the reasonableness of various levels and means of force. For example, in a public non-controlled setting, the risk of innocent persons wandering close enough to be hit by bullet ricochets is much higher than in controlled prison or facility settings. Therefore, permitting warning shots in controlled settings and prohibiting them in non-controlled settings is consistent with the reasonableness standard set forth earlier in this section.

Since this is a new section, GC § 11346.2(a)(2) requires that authority and reference notes be added. Authority cited is PC § 5058. Reference cited is PC §§ 196, 835a, 2651, 2652, and 5054; and CC § 50; and *Whitley v. Albers* (1985) 475 U.S. 312, 106 S.Ct. 1078.

New § 3268.1, *Reporting and Investigating the Use of Force*

Subdivision (a) *Reporting Non-Deadly Force* is adopted to formalize the requirement that staff report on non-deadly force used while on duty.

Subdivision (a)(1) requires staff to document in writing any observations or use of non-deadly force. Certain elements of the document are specified, e.g. identify witnesses, description of circumstances preceding the force, description of the extent of force used. This ensures that all necessary facts are available for departmental or criminal review of the force used.

Subdivision (a)(2) requires that the immediate supervisor, of the employee writing the use of force document, do the following: (a) review the document, (b) evaluate the situation, (c) form a conclusion on the appropriateness of the force used, (d) document the supervisor's own conclusions, and (e) forward both documents up through the chain of command to the institution head. It also requires the institutional head to either approve the documents or take follow-up action. This ensures that staff is held accountable for their use of non-deadly force, appropriate inmate discipline is provided and staff training is augmented as needed to maintain adherence to departmental use of force policy.

Subdivision (b) *Reporting Deadly Force* formalizes the requirement that staff document any deadly force used either on or off duty.

Subdivision (b)(1) requires staff to notify a supervisory employee without delay. This ensures that supervisors are aware of the use of force and can promptly take the other measures required by these regulations, e.g. document the events.

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Subdivision (b)(2) requires that the supervisor notified of the employee's the use of deadly-force take the following actions: (a) make appropriate notifications up the chain of command, (b) determine if the location in an institution or facility, (c) to physically go to the location if it is within an institution or facility, and (d) ensure that the scene of the event, if located within an institution or facility, is protected from contamination prior to the necessary investigation. These requirements ensure that staff is held accountable for their use of deadly force, appropriate inmate discipline is provided and staff training is augmented as needed to maintain adherence to departmental use of force policy.

Subdivision (b)(3) requires that the Assistant Director, Office of Internal Affairs, or designee, designate an employee to be in charge of the investigation. It requires the designated employee to go and take charge of an institutional or facility scene of the use of deadly force. It also requires the designated employee assembles a staff, ensure coordination with affected law enforcement entities and that all necessary investigative procedures are accomplished. If the deadly force is used off facility grounds, then local law enforcement would have jurisdiction and be responsible for taking charge of the scene. Lastly, this subdivision requires the designated in charge employee to report to the Director, concluding whether the extent of the force used complied with the law. This ensures that staff is held accountable for their use of deadly force, and appropriate inmate discipline or criminal prosecution is provided.

Subdivision (b)(4) requires staff to convene a Deadly Force Review Board (DFRB) as soon as possible after the previously described staff investigation is completed.

Subdivision (b)(4)(A) requires that the Director or designee shall designate the members of the DFRB. This ensures that the group reviewing the use of deadly force will be independent from the head of the particular facility or locality where the incident occurred.

Subdivision (b)(4)(B) provides that the DFRB shall be composed of at least four members. The number four was selected to balance the need for a variety of experience and viewpoints, having a departmental representative and having an efficient team that could complete their duties within a reasonable timeframe. Three shall be non-departmental law enforcement professionals each with a high degree of administrative experience. This provides independence from the Department and assurance that the members have sufficient background to make informed findings and recommendations. One member shall be a Regional Administrator or Regional Parole Administrator from outside the region or jurisdiction where the deadly force occurred. This provides some degree of independence from the facility where the deadly force occurred as well as necessary experience in the successful administration of departmental facilities. The Regional Administrator or Regional Parole Administrator's direct experience with departmental facility operations is necessary in order to provide relevant information and context to the DFRB's non-departmental members. Lastly, the Director or designee is given discretion to appoint additional members to the DFRB. This is necessary to provide the possibility of additional or specialized expertise to the DFRB on a case-by-case basis.

Subdivision (b)(4)(C) provides that the DFRB shall examine the incident to review to determine the extent to which departmental use of force policies were complied, and what modifications were necessary to departmental policy, training or equipment. The DFRB must provide its findings and recommendations to the Director, in a written report. It requires the Director to either approve the Board's report or take follow-up action. This ensures that staff are held accountable for their use of non-deadly force, appropriate inmate discipline is provided and staff training and/or equipment is augmented, and the Department modifies its use of force policy as necessary. These provisions implement the Director's duty under PC § 5054 to provide for the care and custody of inmates transferred to his or her jurisdiction, as well as the supervision, management and control of the prisons.

Since this is a new section, GC § 11346.2(a)(2) requires that authority and reference notes be added. Authority cited is Section 5058, Penal Code. Reference cited is Sections 196, 835a, 2651, 2652, and 5054 Penal Code; Section 50 Civil Code.

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§ 3268.2, *Use of Restraints*, moves, renumbers and amends existing § 3280, *Mechanical Restraints*.

Changes are made to grammar, punctuation and style to meet the Department of CDC's current standards. Duplicative language is eliminated. For example, in subsection (b), the prohibition against applying restraint equipment which "inflicts physical pain" is deleted, but a prohibition against applying restraint equipment "likely to cause undue discomfort" is retained.

Later in subsection (b), the limitation on securing a person to a fixed object as "a temporary emergency measure" is retained, but the further following limitations were deleted as duplicative, or obsolete, , and adequately covered by the basic use of force policy adopted in section 3268, above. That further limitation, being deleted, read: "and then only when temporary holding facilities are not available or the availability and use of additional staff is insufficient to meet the emergency need."

Former subsection (c) is deleted.

Reference notes to PC Sections 196, 830, 835a, 2651 and 2652.5 are being added to this section.

Amend Existing Section 3276 Firearms.

Subsection (a) is amended to change a cross-reference to subsection (b). Since subsection (b) is being deleted, the cross reference in subsection (a) will be changed to refer to new section 3268, which covers the same subject as (b)--use of force.

Subsection (a)(1) is being renumbered as (b); and subsections (a)(3) through (a)(9) are renumbered as (c) through (i).

Subsections (a)(2), and (b)(1) through (6) are being deleted. Those policies are updated and covered in new section 3268—use of force.

Amend Existing Section 3277. Use of Tear Gas.

This section is being deleted as inconsistent or duplicative with new section 3268.

Repeal Existing Section 3279. Use of Force.

Section 3279 is being repealed as partially inconsistent with new section 3268. All the areas now covered in 3279 require the updated coverage provided in new section 3268—use of force.

Move, renumbers and amends existing § 3280, *Mechanical Restraints*

Section 3280, *Mechanical Restraints*, has been moved, renumbered and amended. Its provisions are being relocated to Section 3268.2, *Use of Restraints*. Please see the detailed description of these amendments and their rationale, above.

Repeal Existing Section 3281. Corporal Punishment.

Section 3281 is being repealed as duplicative of new section 3268. All the areas now covered in 3281 require the updated coverage provided in new section 3268—use of force.